Health Now, Inc. d/b/a Dr. Rico Perez Products *and* Retail, Wholesale & Department Store Union, UFCW. Cases 2–CA–37882, 2–CA-37886, 2–CA–37894, 2–CA–37902, 2–CA–37921, and 2–CA–38003

October 31, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On March 7, 2008, Administrative Law Judge Steven Davis issued the attached decision. The Respondent and the General Counsel each filed exceptions, a supporting brief, an answering brief, and a reply brief. The General Counsel also filed a motion to strike portions of the Respondent's answering brief, and the Respondent filed a brief in opposition to that motion.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified below and to adopt the recommended Order as modified[4] and set forth in full below.[5]

AMENDED CONCLUSIONS OF LAW

1. By threatening employees with loss of jobs and store closures if they voted for the Union, the Respondent violated Section 8(a)(1) of the Act.

2. By threatening employees with relocation of the business out of state and with store closures if the employees continued to support the Union, the Respondent violated Section 8(a)(1) of the Act.

3. By threatening employees with unspecified reprisals in retaliation for their support for and activities on behalf of the Union, the Respondent violated Section 8(a)(1) of the Act.

4. By accusing its employees of disloyalty because they supported the Union, the Respondent violated Section 8(a)(1) of the Act.

5. The Respondent has not violated the Act in any other manner.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because the primary language of the employees involved is Spanish, the notice shall be posted in English and Spanish at all of the Respondent's New York and New Jersey stores.

ORDER

The Respondent, Health Now, Inc. d/b/a Dr. Rico Perez Products, Miami, Florida, and various locations in New York and New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of jobs and store closures if they vote for the Union.

(b) Threatening employees with relocation of the business out of state and with store closures if the employees continued to support the Union.

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[1] We deny the General Counsel's motion to strike those portions of the Respondent's answering brief that cite alleged misrepresentations made by employee Yolaidys Machado to the New Jersey Division of Civil Rights and to the local police. The judge admitted that evidence into the record, and the General Counsel did not except to that admission. In any event, there is no indication that the judge relied on the disputed evidence, and neither do we.

[2] The Respondent excepts to the judge's decision to grant the General Counsel's motions to amend the complaint, made during the hearing, to include additional alleged violations of Sec. 8(a)(1). We find no merit to that exception. The Respondent argues, first, that the amendments were improper because the facts were well known to the General Counsel "months before" he moved to amend. In fact, the additional allegations were based on the written text of Dr. Manuel Rico's September 12 speech, first provided to the General Counsel by the Respondent on the opening day of the hearing, and on the testimony of Dr. Rico and other witnesses. Second, the Respondent argues that a non-Board settlement between the Respondent and the Union precluded the new claims. To the contrary, that settlement pertained only to alleged unilateral and retaliatory changes in violation of Secs. 8(a)(5) and (3). Accordingly, that settlement did not preclude the additional Sec. 8(a)(1) allegations based on Dr. Rico's speech.

[3] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the Respondent, through Dr. Manuel Rico, made statements to employees indicating that their support for the Union was futile, in violation of Sec. 8(a)(1). In the particular circumstances of this case, we find it unnecessary to pass on that issue because the more serious threats of job loss and store closures subsume any implied threat of futility. See *Electric by Miller, Inc.*, 344 NLRB 266, 269 (2005).

In adopting the judge's finding that the Respondent lawfully discharged Vicente Londoño for insubordination, we do not rely on the judge's finding that Londoño's offensive comments to Francisco Rico and Carlos Rico further warranted his discharge.

[4] We shall modify the judge's conclusions of law and recommended Order to conform to the violations found. We shall also substitute a new notice to conform to the modified Order.

[5] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

(c) Threatening employees with unspecified reprisals in retaliation for their support for and activities on behalf of the Union.

(d) Accusing its employees of disloyalty because they supported the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its New York and New Jersey facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, which shall be printed in English and Spanish on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 2006.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten you with loss of your jobs or closing of your store if you vote for Retail, Wholesale & Department Store Employees, UFCW (Union), or any other labor organization.

WE WILL NOT threaten you with relocation of the business out of state or closing of your store if you continue to support the Union or any other labor organization.

WE WILL NOT threaten you with unspecified reprisals in retaliation for your support for and activities on behalf of the Union or any other labor organization.

WE WILL NOT accuse you of disloyalty because of your support for the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by the National Labor Relations Act.

HEALTH NOW, INC. D/B/A DR. RICO PEREZ PRODUCTS

Lauren Esposito, Esq., for the General Counsel.
Robert J. Lanza and *Eva Lopez-Paredes, Esqs. (Sonnenschein Nath & Rosenthal LLP),* of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge: Based on charges and an amended charge[1] filed by Retail, Wholesale & Department Store Union, UFCW (Union), a consolidated complaint was issued on February 27, 2007 against Health Now, Inc. d/b/a Dr. Rico Perez Products (Respondent or Employer).

The complaint alleges essentially that during the course of a union organizing campaign, the Respondent (a) threatened employees with the relocation of its business out of state and with store closure if they continued to support the Union (b) made statements indicating that support for the Union was futile (c) threatened employees with unspecified reprisals in retaliation for their support for the Union (d) accused its employees of disloyalty because they supported the Union and (e) discharged its employees Yolaidys Machado and Jose Vicente Londoño.[2]

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The docket entries are as follows: Charges in Cases 2–CA–37882, 2–CA–37886, 2–CA–37894, 2–CA–37902, 2–CA–37921, and 2–CA–38003 were filed on September 12, 15, 22, 28, October 10, and November 30, 2006, respectively. An amended charge in Case 2–CA–38003 was filed on December 15, 2006.

[2] Because Alba and her husband Vicente Londoño were witnesses, they will sometimes be referred to by their first names.

Other allegations in the complaint alleging that the Respondent made unilateral and discriminatory changes in employees' working conditions were withdrawn at the hearing because the Respondent and the Union entered into a collective-bargaining agreement.[3]

The Respondent's answer denied the material allegations of the complaint and on October 16, 17, 19, 22, and 23, 2007, a hearing was held before me in New York, New York.[4]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Florida corporation having an office and place of business in Miami, Florida, and retail establishments in New York and New Jersey, is engaged in the retail sale of health products. The Respondent annually derives gross revenues from its business in excess of $500,000, and purchases and receives at its New York facilities goods and products valued in excess of $50,000 directly from points outside New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

The Respondent is a family owned and operated retail business with headquarters in Miami, Florida. It was founded in 1983 by Dr. Manuel Rico Perez, a physician who fled from Cuba upon Fidel Castro's assumption of power in that country. His children continued the business after his death in 2004. They are: Dr. Manuel Rico,[5] president, Gloria Prado, vice president, Francisco (Frank or Pancho) Rico, and Carlos Rico. Dr. Rico has continued a radio show begun by his father in which he speaks about health and nutrition and promotes the Employer's products.

The Respondent began its operation with one store in Florida, then added another one in that state, and then in 1991 opened its first stores in New York and New Jersey. It currently operates two stores in Florida and ten in the New York-New Jersey area, employing about 23 workers–two or three in each store.

The Rico family is located in Florida, and occasionally travels to New York to visit the stores, but in order to monitor the stores' operations in New York and New Jersey it employed supervisors Carlos and Miriam Seijas. The Seijas have lived primarily in Florida since 2004, but visit the New York stores regularly and otherwise are in contact with the workers by phone. Carlos Seijas testified that he and his wife have been employed by the Respondent for 11 years. He described their responsibility as being in charge of personnel, hiring, firing, and training. He stated that he expected the workers to follow his instructions and to call him if they encountered a problem that was unique.

The Seijas were described by employee witnesses as supervisors who visited the store every 2 to 3 months. Employees called the Seijas with any issue they had: late arrival to work, absence due to illness, vacation requests, or problems with the machines.

2. The Union's organizing drive

The Union filed a petition on August 4, 2006.[6] Dr. Rico stated that he first learned of the Union's presence on that day when he received a fax from the Union's attorney. Neither he nor his family had any dealings with a union prior to that time. A Stipulated Election Agreement was approved on August 18, setting an election for September 14 at all ten New York-New Jersey stores.

On August 21, the Respondent entered into a contract with Yessin & Associates LLC pursuant to which that company agreed to act as its consultant in the campaign. Jose Salgado was Yessin's on-site representative.

Carlos Rico testified that Salgado worked with the Respondent in behalf of its effort to oppose the Union's organizing campaign. Dr. Rico downplayed Salgado's role, stating that he advised the Employer regarding how to avoid committing an unfair labor practice. Salgado recommended that a DVD movie be shown to the workers, thereby permitting the Employer to avoid saying anything that might be construed as an unfair labor practice. However, as will be seen below, Dr. Rico made one speech at a meeting in which he made unlawful statements to the employees.

The Rico brothers and Salgado visited all the stores in the weeks before the election. A video, which Dr. Rico conceded was critical of unions and union representation, was shown. Also, employees were given an NLRB booklet and the Union's constitution and forms it filed with the U.S. Labor Department showing how the Union spent its money.

Alba Londoño, who was employed in the Brooklyn store and whose husband is an alleged discriminatee in this case, testified that in early September, a man who was with the brothers spoke to them about unionization. This undoubtedly referred to Salgado, who admittedly answered the employees' questions about representation and showed a video. Alba stated that he told the store's workers "how bad it was going to be" if they became union members. She also quoted him as saying that Dr. Rico could relocate the stores to Los Angeles because he was the only owner and the workers would lose their jobs. She also stated that Dr. Rico said that he could sell the stores and move

[3] The charges in Cases 2–CA–37886, 2–CA–37894 and 2–CA–38003 were withdrawn. That part of the charge in Case 2–CA–37882 which alleges a unilateral change was also withdrawn.

[4] After the close of the hearing, I received in evidence G.C. Ex. 29 (a-c), a transcription of certain videos referred to in the hearing. No objection was made by the Respondent to the receipt in evidence of this exhibit.

[5] All references to Dr. Rico hereafter will be to Dr. Manuel Rico, president of the Respondent.

[6] All dates hereafter are in 2006.

them to Los Angeles.

Alba's husband Vicente estimated that Dr. Rico, Francisco, and Salgado visited the Brooklyn store three or four times before the election. At their first visit, Dr. Rico told him that Salgado had extensive experience with unions and he would answer any questions Vicente might have about the Union. Salgado told Vicente that he had been a member of the union but left the organization because "everything was a big pack of lies." He said that Vicente should open his eyes about the Union, showed the workers a video, and said that his "best choice" was to vote against the Union.

Dr. Rico said that no manager or supervisor of the Employer spoke at the meetings at the stores, nor did Salgado speak during those presentations. The Respondent's witnesses testified that Salgado visited the store with the owners, and that while there he did not speak to the workers without an owner being present. Nor did he speak alone with any of the employees. Dr. Rico and Francisco stated that when Salgado was in their presence he did not make any threats to employees. Francisco specifically denied that Salgado spoke to workers while they were at the Brooklyn store, and denied hearing any threats made by him.

However, it does appear that Salgado spoke to the workers at the stores. Carlos Rico testified that Salgado visited the stores to "educate them towards the union's policies and practices," and "provided information on unions and basically what he knew about them," and Salgado stated that he spoke to the employees.

Salgado testified that he had been an organizer for two international unions for 9 years prior to joining Yessin. He described his duties on behalf of the Respondent as helping it comply with the National Labor Relations Act in its campaign opposing unionization. He stated inconsistently that he was not aware that the Employer opposed the unionization of its employees, but that he understood that it did not want a union on the premises.

Salgado stated that in response to employee questions, he shared his opinion regarding whether the Union was good or bad. He told the workers that they should ask for and read the Union's constitution, bylaws, and rules and regulations, but he did not give his views as to how the employees should vote in the election. He distributed literature including the Union's constitution and showed videos whose topic was "collective bargaining." Salgado denied telling the employees that the stores would close or threatening that the Employer would move its operations if they voted for the Union.

a. The August 26 meeting

On about August 26, the Respondent held a mandatory meeting of its employees at a restaurant. Present were the employees of three New Jersey stores, the Rico brothers, the Seijas, and Salgado. Dr. Rico stated that he told the workers that the Employer was contacted by the Union and that they would be voting. He added that he had received complaints from callers to his radio show that employees spoke on the phone instead of serving them, and that they were not "being nice" to their customers. He advised them of the importance of customer service, and being in front of the cash registers so that when a customer walks by the store they see that a salesperson is there. He mentioned that if no one was sitting at the window a prospective customer may believe that the store is not open.

Machado testified that at the meeting, Dr. Rico explained that he had received several complaints from customers about the stores, including the Elizabeth store where she worked, but that he wanted to put those complaints in the past and start afresh. He sought suggestions to improve sales.

In response, the workers spoke about certain issues later set forth in their letter of August 28, below, including improving work conditions. Machado said that nearly all the employees spoke at the meeting, briefly stating their concerns regarding the stores they worked in. Machado said that although none of the employees spoke for a long time, she spoke the longest but could not estimate the amount of time she spoke. Machado was not critical of the Respondent, but said that sales would improve if more products were delivered to the stores and if a machine used to process payment by check was repaired. Dr. Rico responded that the Respondent was in the midst of a "financial crisis" that was being resolved and that those two problem areas would be remedied.

Machado also asked that there be more communication between the workers and Dr. Rico. Teresa Granado, Machado's coworker stated that Machado also complained that Dr. Rico criticized the employees on his radio show, saying that that contributed to low sales. In reply, Dr. Rico promised to give his workers a "vote of confidence." However, Machado did not corroborate this remark allegedly made by her. The Union was not mentioned at the meeting. Dr. Rico did not recall whether Machado spoke at that meeting.

Machado testified that following the meeting, Miriam Seijas spoke to her in private, saying she did not think that she "could have spoke [sic] in that manner." Machado replied that she said the truth.

b. The grievance letter

On August 28, the following letter was sent to Dr. Rico:

> We, the employees at Health Now Inc., DBA Rico Perez Products Inc. are writing you to notify you of the problems we have at the 10 stores in New York and New Jersey. We want to inform you about the problems we have had for several years; which have become worse lately; for example:
>
> 1. Intimidation, personal threat (loss of work)
> 2. The way in which you are channeling problems though Miss Mizi Cervantes, which is not the most correct.
> 3. The lack of respect towards the employees publicly through the radio, this undermines us in front of the clients (ill willed)
> 4. Lack of benefits; we want equality at work, because at the Florida store the employees are offered medical benefits, in the rest of the stores they are not offered.
> 5. We want better work conditions, for example; heat, repairs to buildings that are in bad shape, there are also health and security problems we want corrected.
>
> We have taken these decisions because in the past we had tried to inform you of our problems and it was not possible

due to your lack of time and interest for your employees.

For these and other reasons, we have taken the decision to organize with the union, to have a voice at work.

It is very important we have a meting with you, at the location of your preference, as soon as possible with the entire group.

All of the employees at the New York and New Jersey stores.

Sixteen employees signed the letter, including Machado and Alba Londoño. Vicente Londoño did not sign it.

c. The September 12 meeting

On September 12, 2 days before the election, a mandatory meeting was held at a restaurant at which all the employees in the New York-New Jersey stores were directed to attend. Dr. Rico read from a statement which he prepared from materials provided by Salgado, as follows:

Today I want to talk to you today, so that you hear from me, what your vote on Thursday will say about this company.

We know and appreciate your efforts at work. I know how difficult your conditions at work have been.

My brothers and I are the only owners of this company. We do not have or want partners. We think this company has the potential to be good for you and for us, as well.

But do not be mistaken, we will understand your vote on Thursday as a message to us.

We do not have any interest in being the owners of this company under the union. My father fled communism over 46 years ago. In my opinion, the union is a form of communism. In the 23 years of our company, first in my father's hands and now in ours, we have never been under a union.

Since his death sales have gone down severely, as you, who have been with us for so long, know very well. During this time, we have demonstrated our loyalty towards you, by keeping your jobs, not like the loyalty you are showing us.

Our company began 23 years ago from just one store in Miami, only taking orders over the phone and we did very well, we could have gone back to our roots, but we didn't.

Perhaps you thought that due to the money from sales at the stores, we wouldn't make a decision that puts those sales in danger. Again, do not be mistaken, if we are put in the position of choosing between losing that money and staying here with the union, we prefer to lose the money.

Your decision is personal and important to you, but it is also personal and important to us. A "NO" vote on Thursday will be a sign of support for the measures we are taking with this company since our father passed away.

We can do better together, but only with a "NO" vote to the union.

Based on the receipt in evidence of this speech, the Respondent, at the hearing, admitted paragraph 7(a) of the complaint that it threatened employees with store closures if they voted for the Union.[7]

In connection with the speech, Dr. Rico testified that it was still his opinion that the Union may "do something that is going to push us over the edge in the sense that we may not be able to handle the cost involved with all the things that will come with this union. And maybe it will cause us to close the stores by losing money."

At the September 17 election, 27 employees voted in favor of union representation and one voted against. On September 25, the Union was certified as the exclusive collective-bargaining agent of all employees in all ten New York-New Jersey stores.

3. The discharges

The Respondent has no employee handbook and no written policies or procedures that address discipline and discharge. Dr. Rico stated that he and Prado confer and jointly make a decision as to whether to discharge an employee.

a. Yolaidys Machado

I. THE EVENTS LEADING UP TO THE DISCHARGE

Machado began work for the Respondent in July, 2004 at the Elizabeth, New Jersey store. Her coworkers were Teresa Granado and Adales Bermudes.

Machado signed an authorization card for the Union, attended several union meetings in August, 2006 and voiced her opinion at an employer meeting as to the content of the August 28 letter set forth above.

The entrance door to the store leads into a lobby area where a large glass window separates the lobby from the employees' work area. There are stools at a desk behind the window at which employees may sit while speaking to the customer through the window. A six foot by four foot table in the work area is located about 9.5 feet from the window and may be seen from the customer side of the window if the customer is at the window.

Dr. Rico stated that upon his visit to the Elizabeth, New Jersey store at some unspecified date, he noted that Machado was not sitting at the cash register. He orally warned her about this conduct. Dr. Rico again visited the store on September 10 with his brothers in order to remove inventory. He observed the following, as set forth in his memo dated that day:

RE: Employees Not Following Instructions
Today I visited the Elizabeth, New Jersey store where I found the following two employees, Teresa Granado and Yolaidys Machado, sitting in the back of the store. Employees need to be sitting in front of the window so that the customers know that someone is in the store. These two employees were instructed of this policy in writing and verbally.

Dr. Rico dictated the memo by phone to Prado in Florida. They were not shown the memo, a copy of which was placed in their personnel files (presumably in Florida), but Dr. Rico stated that he "put a note in her file right in front of her as I dictated it to my sister. Because I did it from the store." In

[7] Tr., pp. 80–81.

explaining the last sentence of the memo, Dr. Rico testified that he could not recall if he advised them in writing of the policy, but he remembered orally telling them of such a policy. Machado testified that during this visit, no one spoke to her about sitting in front of the customer window, and denied that Dr. Rico told her that employees were required to sit at the customer window.

Granado testified that she could not recall if any of the owners mentioned anything to her that day about sitting at the customer window. Machado stated that on September 10, a 23-percent discount on products was instituted, but there were few products in the store to sell because nearly all of the store's merchandise was removed that day by the Ricos. She complained to Carlos Seijas that afternoon and asked him how long the discount would be effective. Seijas asked her to ask Dr. Rico. During a routine call by coworker Granado, Dr. Rico asked to speak to Machado, and inquired as to her "questions." She said that a customer asked how long the discount would be in effect, and when the "missing" merchandise would be returned to the store. Dr. Rico replied that the discount would last as long as he wanted, adding that she should tell the "four cats" to obtain their products from Miami. Machado asked Dr. Rico not to "disrespect" her because she had not shown him disrespect—she had simply asked him the questions her customers asked her. Dr. Rico replied that she was already disrespecting him "since the moment that I wanted to opt for a union." Machado responded that although she was "demanding respect," she wanted to know whether his comment was for her or for her customers, and he replied that it was for her.

Dr. Rico denied that Machado asked him when the discount would end or when the missing merchandise would be returned. However, he conceded that in September, he and his brothers removed large amounts of inventory from the New York-New Jersey stores and took them to Florida because of a sale. He stated that then when the sale commenced it had no expiration date, but was dependent on when the manufacturer could supply the products. On September 18, the sale ended. Dr. Rico further denied telling Machado to tell the "four cats" to make their purchases in Miami, explaining that if there are 10 stores in the New York area why would he tell them to purchase them in Florida. Dr. Rico also denied telling Machado that she disrespected him by seeking union representation.

II. THE DISCHARGE

Machado testified that on September 27 she arrived at work at 9:25 a.m., punched in, put on her apron and sat at the table in the work area. She then opened her purse and took out her makeup kit in order to reach the bottom of her bag so that she could remove her medication. Coworker Granado sat next to her. No customers were in the store at that time. She began to take her medication and Francisco walked in, saying that she was doing her nails and that "this wasn't the place to do that."[8] Machado denied doing her nails, replying that she was taking her vitamins, and said that it was her word against his. Francisco raised his voice saying he was certain of what he saw. He asked her why a bottle of acetone, which is commonly used as nail polish remover, was on the table. Machado replied that it was always there and was used to clean her hands after changing the ribbon on the cash registers. She denied yelling at Francisco.

Machado stated that Francisco then made a cell phone call. Machado picked up her purse, took care of some customers and then prepared a bank deposit. She stated that 45 minutes later, Dr. Rico called and told her that she was fired. Machado denied doing anything wrong. She spoke to Dr. Rico in a conversational tone, denying yelling at him.

Machado stated that she believed that sitting at the table was permissible when no customers were present. Granado testified that prior to Machado's discharge, they "always" sat at the table and were never told by management, either orally or in writing, that they could not do so. She noted that other than the table the only seating area in the store was at the counter on two small stools. Granado also stated that the Seijas saw her sitting at the table in the past and said nothing about that, and further that her manager and co-worker Gladys Bermudez told her when she began work that normally they would be sitting at the table. Granado further stated that when they do the inventory each day they sit at the table. However, it must be noted that Granado also testified that she was told by Bermudez that she should sit where she was "in view of the customers," adding that such a place was "sitting there in the center of the store" where the table was located.

Granado essentially corroborated Machado's testimony that she was looking in her bag for her medication and not painting her nails or applying make-up when the brothers arrived, and that she spoke in a conversational tone, denying that Machado yelled or screamed. Granado stated that when the brothers arrived she got up from the table "out of respect" and stood near the cash register.

Francisco testified that when he entered the store, he saw Machado and Granado sitting at the table, and Machado polishing her nails. Francisco said she then picked up all of her nail polishing and make-up items and went to the back room of the store. He asked whether she was aware that her sitting at the table and doing her nails was against company policy. She became sarcastic, saying that it was her word against his. He went outside to bring in some equipment and when he returned she was putting those items in the back of the store. Francisco's memo made that day corroborated his testimony.

Francisco called the main office and related that he saw both Machado and Granado sitting at the back table, and that when he approached, Granado got up without comment and sat at the customer window. In contrast, Machado was "sarcastic, loud and argumentative." Francisco related that Machado "insulted" him, calling him a "liar," saying that he had not seen her with the nail polish, and that it was her word against his.

Carlos stated that Francisco entered the store first that day. When Francisco came out he told Carlos that Machado was in the back of the store doing her nails. When Carlos entered he saw nail products on the table and Machado walking back and forth to the rear area of the store carrying beauty supplies and cosmetics. Carlos stated that he smelled the nail polish, and described Machado's responses as "disrespectful."

Prado stated that on September 27, Francisco called and said

[8] The brothers were there to install certain surveillance cameras.

that when he entered the store, he saw Machado and Granado sitting at the table with Machado giving herself a manicure. He told them that they were not supposed to be sitting there; they should be sitting at the customer window. Granado rose from her chair and sat at the window, but Machado was not going to the same area. Prado heard Machado screaming "it's your word against mine." Prado told Francisco that she would call him back, and told Dr. Rico what happened. They decided that Machado's insubordination was not appropriate and that Francisco must be respected as owner and manager.

Dr. Rico called back. He stated that during the phone call he heard Machado "screaming" but could not hear what she was saying. Francisco reported that she yelled "it's your word against mine." Dr. Rico reminded Prado that Machado had committed the "same exact thing" 17 days before, referring to the September 10 warning. Dr. Rico and Prado decided to fire Machado, and told Francisco to put her on the phone. Dr. Rico told her she was fired and asked her to leave. She refused to leave unless she received a written reason for the discharge. Dr. Rico refused and the police had to be called to remove her from the store. Prado testified that Machado was fired for two reasons: primarily because of her insubordination to Francisco, and because she did not follow company policy.

Dr. Rico sent a letter to his attorney that day, in part, as follows:

> On September 27, 2006 I was informed by my brothers, Frank Rico and Carlos Rico Perez, that when they arrived this morning at the Elizabeth store, both employees scheduled to work were not at their respective areas where they had been advised in writing and again personally by me on September 10, 2006 and that Yolaidys Machado was also in the process of painting her nails.

Brian Lebensburger, an estate and tax attorney, was present in the Respondent's office when Prado received the call about Machado. Prado advised him that her brothers had "just caught Machado doing her nails away from her side of the window" and that she was arguing and fighting with them and being insubordinate.

On October 5, Prado sent a letter to the New Jersey Department of Labor with an explanation of Machado's discharge. The letter stated that Machado received a warning for not sitting in front of the window on September 10, and that this "policy" [requiring employees to sit in front of the window] was communicated in writing to all store employees.

Dr. Rico stated that Machado attended one meeting where he spoke about customer complaints, employees speaking on the phone and sitting at the cash registers. Dr. Rico, Prado, and Francisco denied any knowledge of Machado's activity in behalf of the Union, and also denied that any such activity played a role in their decision to fire her.

Carlos Seijas testified that when he trained new employees he informed them of the Respondent's long-standing "rule" and "practice" that they were supposed to be visible to potential customers who walked in front of the store so that they would know that the store was open. He further stated that he expected employees to be "around the front of the store" at the cash register or be present at the front of the premises immediately behind the counter so that they could be seen. However, he stated that on occasion he has seen employees eating at the table in the work area and doing other work, such as inventory, while seated at that table. He could not recall an occasion when he saw a worker doing personal business at the table. If he saw such an activity, he would ask them for an explanation and reprimand them. Carlos Rico stated that employees use the table in the work area to do a reconciliation of the cash register, and that at some stores products are kept on that table.

Seijas stated that a card with the store hours is posted on the front door, and that when the stores were opened each had a reversible sign reading "open" or "closed." He did not know whether Machado's store had such a sign when she was fired. Francisco did not know whether Granado received any discipline for being at the back table and not at the customer window.

III. MACHADO'S CLAIMS WITH OTHER AGENCIES

Subsequent to her discharge, Machado filed an application for unemployment insurance benefits which was denied. The Department of Labor found that she was discharged for not following "specified work rules and then becoming insubordinate to the point that the employer was compelled to secure police assistance . . . to remove you from their premises." Machado also filed a charge with the New Jersey Division of Civil Rights, claiming that she was discharged because she was pregnant. The charge was dismissed. The Board has long held that such evidence is not controlling but it is admissible for whatever probative value it has. *Forrest City Machine Works*, 326 NLRB 1093, 1094 (1998).

b. Vicente Londoño

I. THE EVENTS LEADING UP TO THE DISCHARGE

The Brooklyn store's employees were husband and wife Vicente and Alba Londoño. Vicente began work in about 1994. He stated that he first heard about the Union in June, 2006 when a coworker mentioned it. He signed an authorization card for the Union and attended many union meetings.

Vicente stated that when Dr. Rico visited the store before the election, Vicente reminded him that he had offered the workers a wage increase of 25 cents per hour, but they did not receive it because of "cutbacks" due to the company's poor financial condition and its claim that it was nearly on the verge of bankruptcy. Vicente also complained that Dr. Rico had eliminated a 25-percent discount on employee purchases. Dr. Rico replied that he was looking into those issues and asked that Vicente vote "no."

Dr. Rico denied telling Vicente that he ended an employee discount, and also denied that he spoke to him about a 25 cent per hour raise. He stated that, in fact, employees received such a raise in 2005. In addition, according to faxes sent in April and May, 2006, employee discounts were permitted with Dr. Rico's signed authorization.

Dr. Rico stated that on August 22, Londoño received a written warning growing out of Dr. Rico's offer of free products to a caller to his radio program. Dr. Rico had sent written instructions setting forth how he wanted the products to be given, stating that the customer must show legal identification and asking Vicente to write the customer's name, address and

phone number and fax that information to Dr. Rico.

Dr. Rico's warning memo states that upon receiving the fax from Londoño, he noted "clear discrepancies as to the handling of the procedure" in that Londoño "rung the purchase through a register meant to be used only in case of failure of our main cash register, made a copy of the customer's permanent resident card and did not note the information he requested. As a consequence I received incomplete information and a cash register now with a 'SHORTAGE' of cash. I called Mr. Londoño and asked why he had not followed my direct and clear instructions as to how to handle the process and his reply was that it was his way of doing it. I informed him that my instructions are to be followed precisely, and if there was any discrepancy, they could call to clear it up. I also informed him that this warning was being noted to his file." It should be noted that Dr. Rico's instructions did not specify which cash register was to be used or that the resident card should not be copied. Londoño did not deny receiving such a warning.

It should be noted that the document faxed by Vicente to Dr. Rico included a copy of the customer's permanent resident card, and had the following writing: "Pedro Liriano, Bulwer Pl, telefono 827–1142 (718), casa no. 36." Prado testified that Londoño violated Dr. Rico's instructions by making a copy of the resident card which should not have been done because of privacy considerations. Further, Londoño rang up the transaction as a sale as if he had received cash from the customer whereas the patron was given the product without charge. Also, he used a "dormant" cash register. Prado conceded, however, that the customer's name was on the resident card and that a telephone number and a house number were properly written on Londoño's faxed note, as requested by Dr. Rico.

II. THE DISCHARGE

On October 3, Vicente and his wife Alba were at the Brooklyn store. Owners Francisco and Carlos Rico arrived and shortly thereafter customer Roberto Guerrero entered the store.[9] Vicente testified that Guerrero asked him for two bottles of shark cartilage. Vicente entered the purchase in the cash register and processed Guerrero's debit card. A receipt was given to Guerrero who said that the items were too expensive. He said that he wanted two bottles of colostrum instead. Vicente said that he would exchange the items.

Vicente stated that at that point, the brothers were close to the register watching the transaction. Vicente testified that at that point he said to them "do me a favor and take it over and try to solve the problem for him. They took the receipt and I gave a step back, I crossed my arms and I was just there to see how they handled the situation. They made phone calls to Miami, asking questions here and there. It took a while and I said to myself they do not know what they're doing." He noticed that Guerrero was "a little bit uneasy" and anxious to leave. During that time, Vicente just stood there with arms folded, not saying anything.

Vicente stated that he recalled that Seijas told him to take care of the customer first and then resolve whatever other problem had to be remedied. He then said to the brothers "just a moment, you are looking for a problem where there is no problem. This is very simple." He then had an "automatic reaction" and rang up two colostrums on the register which showed that the customer was owed a refund.

Vicente then followed what he called his usual routine which he had exercised many times over the years. So that the balance in the cash register would remain the same, he went to the petty cash box to take money for the refund. One of the brothers stopped him saying that he was not supposed to take money from the petty cash box for a refund, telling Vicente "you don't know what you're doing." Vicente made no objection but said that he would take the money from the cash register instead. He did so and gave the refund and the receipt to the customer.

Vicente further testified that Francisco asked Guerrero to sign the receipt. Guerrero refused saying that the transaction was completed to his satisfaction. Vicente stated that after the customer left, he told the brothers "what irony that you're looking for a problem where there is no problem only because we are now associated with the union and we are claiming our rights." The brothers then called Miami and conversed in English which Vicente did not understand. They hung up the phone, it rang again, and when Vicente answered, Dr. Rico told him that he was fired for insubordination. After he was discharged, Vicente told them that "it looks like everybody is upset because we are claiming for [sic] our rights—what an irony after all these eleven years I have been working legally for you." He called them "pocket suckers" meaning someone who is not fair with others and having an "inhuman" attitude toward other people.

Vicente was told to leave but refused until he counted the money in the petty cash box with the brothers watching. He found that $20 was missing. Vicente took $20 from his wallet and tried to place it in the petty cash box. Francisco said that he could not do that. Vicente volunteered that it was his practice to borrow money from the box whenever he needed it and left $20 on the table. Vicente said that his daily routine was to fax to Florida an accounting of all the sales for the day and the amount of money received. He stated that on three or four occasions he was advised that a mistake was made in his accountings but he received no written warnings for such misdeed because they were very small errors.

Vicente denied screaming or yelling at the brothers. He said he spoke to them and to Dr. Rico in his usual conversational voice, which he described as "strong and confident."

Alba stated that after the arrival of Francisco and Carlos on October 3, customer Roberto Guerrero arrived and asked for two bottles of shark cartilage and paid with a debit card. Vicente performed the transaction. Guerrero then said that he did not want that product and asked for two bottles of colostrum. Vicente then entered the purchase of two bottles of colostrum in the cash register, and intended to refund the money from petty cash in order to maintain the cash register's $200 balance.

At that point, according to Alba, Francisco asked Vicente what he was doing. Vicente replied that Carlos Seijas taught him to process the refund in that manner. Francisco then told him not to give the customer a refund from petty cash, but to refund the money from the cash register. Vicente then said "you

[9] The brothers were there to install certain surveillance cameras.

are looking for trouble when there is not any trouble—(or where there is no problem). I am doing what Carlos told me to do." Francisco responded "who do you think you are? That you are the owners? The only owners are my brothers and myself." Francisco then wrote something on a piece of paper and asked Guerrero to sign it. Guerrero refused to sign the paper, saying that "everything was correct with Vicente." Guerrero then left.

Further, according to Alba, Vicente accused Francisco of being angry because they were "with the Union." Vicente also said twice that they were "money suckers" or "pocket suckers" and are unfair to the workers. Then Francisco called the main office and in a return call, Vicente was fired. Alba stated that Vicente made those comments both before and after he was fired. Alba denied the brothers' testimony that she initiated the transaction and asked them for help. Rather, she said that Vicente was solely involved in Guerrero's transaction.

Customer Guerrero testified that he ordered the products from Alba and paid with a card which he gave her. After he paid, he asked to speak to Vicente. While speaking to him he noticed that the amount of the purchase was more than he usually paid. He asked Vicente whether the price had risen. Vicente replied that that was the price for the shark cartilage. Guerrero said that he actually wanted colostrum and requested a refund and the proper products. Then Francisco approached and asked what the problem was. Guerrero said that he bought the wrong products and showed Francisco the receipt. Francisco said "wait a minute," stepped back and used his cell phone while Vicente waited for directions. Francisco then spoke to Vicente, but Guerrero could not hear what was said, noting however that they did not appear to be arguing, and also denying that Vicente was yelling. Guerrero then observed Francisco give Vicente "an order" after which Vicente took the money from the cash register and gave it to him. Francisco wrote down the prices of the items and asked Guerrero to sign it. Guerrero placed his initials on the paper. Francisco asked him to sign his complete name and Guerrero refused. Vicente then gave him the colostrums, and Guerrero left.

Consistent with Guerrero's testimony, Francisco stated that Alba was the salesperson who made the sale, and not Vicente. Francisco further stated that Alba asked the brothers for help in making the refund. The patron had requested one product which was paid for by a debit card and rung up on the cash register, but then changed his mind and wanted a less expensive product. Francisco testified that he called the Miami office to inquire as to the procedure to be followed in making such a refund. He spoke to his sister Prado because she was in charge of the accounting function for the Respondent.

Prado testified that the company cannot issue a refund on a debit card, and because money on a debit card does not go into the cash register, but rather goes directly to the bank, if a refund is recorded on the cash register, the balance on the register would be short. Because the issue of making a refund where a debit card was used had never come up, the stores had no guidelines as to how to handle such a transaction. It took her a few minutes to devise a method to resolve this problem and she wrote down the steps needed, and then told Francisco what to do.

Prado told Francisco to take the refund money out of the petty cash box and note that the money was taken from petty cash. In that way the cash register would maintain its proper balance. He was also directed to write down the transaction on the inventory sheet.

Francisco stated that while he was on the phone with Prado standing next to the register, he told the customer to be patient, that he was calling the main office for advice and the matter would be resolved according to that office's instructions. He stated that Mr. and Mrs. Londoño were in the immediate area and were in a position to hear his remarks. Londoño then approached the register, entered a transaction apparently ringing up the sale of the two colostrums, and refunded the money from the register, saying in a loud, intimidating and very aggressive tone "it is not the legal way to do it, and we're going to do it this way. This is the legal way. This is the way we do it. You guys don't know what you are doing. You are greedy and inhumane." Francisco stated that he told Londoño to stop doing what he was doing, but he continued. Francisco was still on the phone with Prado and told her what Londoño said and did. She asked him why he permitted Londoño to proceed with the transaction. Francisco replied that he had no choice—he just abruptly did it. Francisco testified that he could have physically stopped him but did not want to do that. Prado said she would call back. Dr. Rico called back and Francisco explained what had happened. Dr. Rico testified that Francisco said that Vicente "starts punching numbers on the register; and that he's just messed up everything that we had instructed or my sister had instructed on the call of how she wanted it handled."

Prado stated that while she was explaining the refund process to Francisco, and while he was approaching the cash register after removing money from the petty cash box, Londoño "took over" the register and entered as a new sale the correct products given the customer and refunded the money from the cash register. Prado explained that this caused an overstatement in sales since he did not void the prior sales, and caused the cash register to be out of balance. She heard Londoño "screaming . . . that's not the legal way to do things." Francisco remedied the situation by taking money from petty cash and placing it in the cash register.

Dr. Rico told Francisco that he would call back, and he and Prado considered the prior incident of insubordination where Londoño did not follow instructions, and the current "gross insubordination" by screaming at Francisco, and decided to discharge Vicente. He was given the phone and Dr. Rico told him he was fired. According to Dr. Rico, Vicente began to scream obscenities and said he would not leave. The police were called to have him removed but he left before they arrived. Francisco heard Londoño tell Dr. Rico that he was a "degenerate." Francisco did not recall whether that slur was uttered before or after Londoño was told that he was discharged.

Dr. Rico stated that Londoño was fired, for among other things, not following instructions in processing the customer's refund and insubordination to Dr. Rico, his brothers and Prado in disregarding her instructions as to the procedure to be followed in making the refund.

In a submission to the New York State Department of Labor (D0L) regarding Londoño's claim for unemployment insurance, Prado stated that Londoño was discharged for "not following

direct instructions from company's owner and management team—second occurrence." This refers to the incident of August 22. In the same document, Carlos Rico stated that Londoño was insubordinate because he "disregarded Francisco Rico's handling of a transaction and went ahead processing that transaction even though management asked him to stop. He was not asked to help with the transaction and continued with it even after being repeatedly told to not proceed." A reference was made in the submission regarding the prior warning of August 22.

Francisco's hand-written memo included with the DOL package was consistent with the above, and added that Londoño was repeatedly told to stop processing the transaction but continued anyway, saying that this is the way he does it. Francisco responded that it was to be done a different way and Vicente became "aggressive and began insulting us and carrying on how greedy and inhumane we are."

Carlos Rico's written statement to the DOL was consistent with Francisco's. Carlos testified that Londoño was fired because he refused to handle a transaction in the way he was instructed to, and for not listening to direct orders they gave him to not perform the transaction and because of his insubordination toward Francisco. Carlos wrote in his statement that Londoño voided the products unwanted by the customer, but later learned that he had not voided them. He also noted that Londoño "became forceful with us and told us he would not stop because that was the correct way to do it." Carlos also wrote that Londoño claimed that "management's method of processing the transaction was illegal." Carlos explained at hearing that his use of the term "forceful" meant that Londoño's voice became louder and more aggressive. Carlos also testified that the Londoños told him and Francisco that processing a refund to a debit card had not occurred before, and that no procedure was in place to handle such an instance. Carlos stated that he and Francisco asked Londoño several times to cease continuing the transaction but he refused to stop. Carlos quoted Londoño as saying that the way they wanted to process the transaction was "illegal"; that he knew the correct way to process it, and that they were "greedy" and "bad people" by performing the transaction in the way they wanted to do it. Carlos said that Londoño screamed at them. Carlos stated that after Londoño was fired he refused to leave stating that he was not fired and demanded that they call the police. Carlos stated that following the discharge, Londoño called them names, but he could not recall what he said.

Following Londoño's discharge, Carlos, as set forth in his written statement, said that he was "returning cash to the petty cash box from an incorrect customer transaction" and checked its balance. He found that $45.00 was missing. Carlos inquired of the Londoño s who said that nothing was missing, but Vicente took $40.00 from his wallet and put it on the table when he left the store. Vicente also said that the box was missing $6 for gasoline he used, but he did not have the receipt.

Carlos Seijas testified that he never trained employees regarding how to perform a debit card transaction or returns on such transactions. He expected the workers to call him if they had such a transaction and he would call Dr. Rico. He specifically denied training Vicente on performing a refund on a debit card transaction, but stressed that customer satisfaction was the company's "number one priority."

Machado testified hypothetically that if a customer purchased a product he did not want and already paid for it, she would call Seijas for instructions. However that never happened in her experience.

Dr. Rico, Prado, Francisco, and Carlos denied knowledge of any activity engaged in by Alba or Vicente Londoño in behalf of the Union, and also denied that any such activity played a role in their decision to fire Vicente. At the time of the hearing, Alba remained a full-time employee of the company.

Prado testified that it was her opinion that by joining the Union the employees were not loyal to the company because they "went behind our back by going to the Union before having a discussion with us" about any concerns they had. However, she also stated that such disloyalty was not a consideration in determining whether to fire Machado or Londoño.

4. Disparate treatment

Dr. Rico testified that Londoño and Machado were the only employees in the New York-New Jersey stores who were fired for insubordination. On the last day of the hearing, the Respondent offered in evidence a list of 17 employees who were terminated from the Respondent's Florida stores during the period December, 2004 to August, 2007. The General Counsel objected to the list and to any testimony concerning the discharges. I rejected the exhibit pursuant to *Bannon Mills, Inc*., 146 NLRB 611, 633–634 (1964).

Regarding other discharges in the New York area stores, Dr. Rico testified that in late 2005 or early 2006, an employee was fired for leaving the store for a number of hours apparently to make a deposit of the store's proceeds from the previous day. However, he disappeared for hours, apparently not even having made the deposit. Dr. Rico stated that others may have been discharged since he became more involved with the company's operation in 2004, but he could not recall any specific incidents.

Analysis and Discussion

I. INTERFERENCE WITH EMPLOYEE SECTION 7 RIGHTS

The complaint alleges that Dr. Rico's speech delivered to employees on September 12 contained a number of unlawful statements, including (a) a threat of loss of jobs and store closures if they voted for the Union (b) a statement indicating that support for the Union was futile (c) threats of unspecified reprisals in retaliation for their support for the Union and (d) an accusation that its employees were disloyal because they supported the Union.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." In order to determine whether those rights have been interfered with, the test is whether the employer's conduct may reasonably be seen as tending to interfere with such rights. *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999).

A. The Threat of Job Loss and Store Closure

As set forth above, Dr. Rico told his employees at the Sep-

tember 12 meeting that if he had to choose between recognizing the Union and closing his stores he would close the stores. At the hearing, the Respondent admitted that by that statement Dr. Rico threatened store closures.

In addition, by telling the employees that it may close its stores, the Respondent in effect advised them that they would lose their jobs. He said as much in remarking that during times of low sales the Employer has remained loyal to its employees by continuing their employment, unlike the lack of loyalty they have shown by seeking union representation.

In *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969), the Court stated:

> [A]n employer is free to communicate to his employees any of his general views about unionization or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionism will have on his company. In such case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

In his speech, Dr. Rico did not base his remarks on any prediction of likely economic consequences beyond the Respondent's control. His comments did not constitute facts based on objective evidence. His threats to close the stores with the consequent loss of the workers' jobs was made "contingent on the success or failure of the union's organizational campaign, not on economic necessities." *Mr. Z's Food Mart*, 325 NLRB 871, 889 (1998); *Be-Lo Stores*, 318 NLRB 1, 3 (1995). Although at hearing Dr. Rico stated that he believed that the Union may push the Employer economically "over the edge," no support or basis for this prediction was given. *North Star Steel Co*., 347 NLRB 1364, 1365–1366 (2006); *Jonbil, Inc*., 332 NLRB 652, 655 (2000).

The Respondent argues that Dr. Rico's speech tied the Employer's economic situation with the loss of jobs and store closures and therefore it was a protected, valid prediction of objective facts. Thus, Dr. Rico told the workers that since his father's death 3 years earlier, sales had "gone down severely" but nevertheless the Employer has permitted its employees to remain employed. This statement, however, supports the opposite conclusion, that notwithstanding the alleged downturn in the Employer's finances, it had not found the need to lay off anyone, and in addition, no objective facts were cited concerning when the sales downturn occurred and whether that was still the case.

Further, the Respondent also cites Vicente's testimony that Dr. Rico claimed that the company was "nearly on the verge of bankruptcy" and Dr. Rico's statement at the August 26 meeting that the Employer was in the midst of a "financial crisis." These claims were not made during the September 12 speech, were unsupported by any objective fact, and failed to convey the Respondent's belief as to "demonstrably probable consequences beyond his control."

It is also alleged that Salgado threatened employees with relocation of the business out of state and with store closure if they continued to support the Union. In support of this allegation, Alba Londoño testified, as set forth above, that during Salgado's visit to her store, he told the workers that Dr. Rico could relocate the stores to Los Angeles because he was the only owner and the workers would lose their jobs. She also stated that Salgado said that Dr. Rico could sell the stores and move them to Los Angeles. I credit Alba's testimony over that of Salgado. She testified in a forthright, candid manner about a matter which undoubtedly would be expected to make a distinct impression on her.

Salgado's statement as quoted by Alba regarding closing the stores was consistent with Dr. Rico's admitted threat to close the stores if they voted for the Union. Salgado was not a credible witness. His testimony was halting and hesitant. In addition, as set forth above, he gave inconsistent testimony regarding the Employer's position on the unionization of its employees. The fact that Salgado conceded that he shared his opinion regarding whether the Union was good or bad, and Carlos Rico noted that Salgado educated them about the Union lends support to a finding that Salgado made the alleged threat. He was not a mere observer. His role was to support the Respondent's opposition to the employees' effort to unionize the stores. The fact that Dr. Rico prepared his speech, part of which I have found to contain unlawful statements, from materials prepared by Salgado, further supports the finding, which I make, that Salgado threatened employees with relocation of the business out of state and with store closure if they continued to support the Union.

In answer to the Respondent's argument that Salgado's purpose was to assist the Employer in avoiding committing an unfair labor practice, I note that Dr. Rico's speech was prepared from materials supplied by Salgado. As noted above, the speech contained unlawful comments, including an accusation of disloyalty, and an admitted threat of store closure. Apparently, Salgado furnished certain material which had the opposite result.

In connection with this finding that Salgado unlawfully threatened employees, I find that he is an agent of the Respondent which is responsible for those statements. In determining whether a person is acting as the agent of another, the Board applies the common law principles of agency. Agency may be established under the doctrine of apparent authority, when the principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Here, as set forth above, Salgado's company, Yessin entered into a contract with the Respondent to provide advice in opposition to the employees' effort to unionize. Salgado accompanied Employer officials to all the stores and attended group meetings with them at which the Respondent's message, prepared from materials supplied by Salgado, was presented. According to the credited testimony of Vicente, Dr. Rico introduced Salgado as someone who would speak about his experience with unions.

It is therefore clear that the Respondent promoted Salgado to its employees as someone knowledgeable about unions and that the Respondent advised its workers to listen to Salgado's mes-

sage. Salgado's threats to employees were consistent with Dr. Rico's. I accordingly find that Salgado was the Respondent's agent with respect to the threats described above. *Allegany Aggregates*, 311 NLRB 1165, 1165 (1993).

B. Support for the Union was Futile

In support of this allegation, the General Counsel cites Dr. Rico's speech in which he states that "my brothers and I are the only owners of this company. We do not have or want partners . . . .We do not have any interest in being the owners of this company under the union . . .we have never been under a union."

Dr. Rico's statements could reasonably be viewed by the employees that the Respondent would never deal with a Union, and thus it would be futile for them to support the Union. Where an employer told its employees that "no one was going to tell him how to run [its business] the Board found that such a statement indicated that it would be futile for those employees to support the union and thus violated Section 8(a)(1) of the Act. *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1204 (2007).

C. Threats of Unspecified Reprisals in Retaliation for Employee Support for the Union and that its Employees were Disloyal Because they Supported the Union

In support of these allegations, the General Counsel cites that part of Dr. Rico's speech in which he states that the employees were disloyal by seeking a Union when the Respondent permitted them to retain their jobs during an economic downturn.

"It is well settled that statements equating union activity with disloyalty to the employer constitute coercion in violation of Section 8(a)(1) of the Act . . . as well as an implicit threat of repercussions for union loyalty, as opposed to company loyalty." *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996); *Hialeah Hospital*, 343 NLRB 391, 391 (2004).

I accordingly find and conclude that, as alleged, the Respondent violated Section 8(a)(1) of the Act by unlawfully threatening employees with loss of jobs and store closures, relocation of the business out of state, and with unspecified reprisals, and accused its employees of disloyalty because they supported the Union.

II. THE DISCHARGES

Pursuant to *Wright Line*, 251 NLRB 1083 (1980), the General Counsel has the initial burden of establishing that the employee's protected, concerted activity was a motivating factor in the Respondent's decision to discharge him. The elements commonly required to support such a showing are that the employee engaged in protected, concerted activity, employer knowledge of that activity, and animus toward those activities by the employer.

Where the General Counsel makes an initial showing under *Wright Line*, the burden shifts to the Respondent to establish that it would have taken the same action even in the absence of the employee's activities. An employer cannot sustain its burden simply by showing that there was a legitimate reason for the action; it must affirmatively demonstrate that the action would have taken place even absent the protected conduct. *Willamette Industries*, 341 NLRB 560, 562 (2004).

A. Yolaidys Machado

Machado signed a card in behalf of the Union and signed the letter complaining about working conditions. Inasmuch as all but one of the unit employees voted for the Union, it may be assumed that the Respondent believed that Machado supported the Union. It was the Ricos' admitted belief that its employees were "disloyal" by voting for the Union. Machado was discharged 2 days after the Union was certified.

I attach no special significance to the fact that Machado spoke at the August 26 meeting. She raised certain grievances as did other employees who voiced their opinion at that time. Assuming that I believe Machado's testimony, I do not find particularly significant the exchange she had with Dr. Rico on September 10 where he was disrespectful to her and accused her of being disrespectful because she wanted a union. In this respect, Dr. Rico admitted that he believed that all the employees were disloyal to him by supporting the Union.

I find that the General Counsel has established a prima facie case that the Respondent discharged Machado because of her support for the Union. The Respondent believed that she supported the Union and was disloyal to the Employer, it bore animus toward the Union, and her discharge occurred only 2 days after the Union was certified. The General Counsel asserts that "specific" animus has been demonstrated against Machado who testified that after the election she was required to request vacation 3 months in advance as opposed to 20 to 30 days in advance which was the practice prior to the election. As set forth above, the complaint allegation that the Respondent required 3 months' notice of a vacation request was settled during the hearing. Accordingly, the Respondent adduced no evidence regarding the alleged change, and indeed Dr. Rico testified that the Respondent's policy was always to require 3 months' notice. Accordingly, it appears that even assuming that the alleged new policy was put into effect for discriminatory reasons, I cannot find that "specific" animus has been proven toward Machado. Its implementation would have applied to all the unit employees.

The question, therefore, is whether the Respondent has met its Wright Line burden of proving that it would have fired Machado even in the absence of her union activities. This is a close case. I have some doubts about the Respondent's assertions as to its alleged rule that its employees must sit at the window counter, but I believe that on balance the Respondent has met its burden.

The Respondent's reasons for the discharge given at the hearing were "primarily" because of her insubordination to Francisco, and also because of her failure to obey company policy in sitting at the customer window. There was ample testimony that Machado was insubordinate. She challenged Francisco as to his observation that she was doing her nails. I credit Francisco's testimony that she called him a liar. Machado said as much in admitting that she told him that "it's your word against mine." In making that statement, Machado in effect admits to doing her nails, but argues that the charge could not be proven because it was his word against hers.

In this connection, I credit the testimony of Francisco and

Carlos Rico that Machado was doing her nails. Carlos' statement that he could smell the polish is compelling testimony. Questioning Francisco's observation of what he saw and calling a supervisor a liar in front of another employee and supervisor-owners Carlos, Dr. Rico and Prado is unacceptable. The Board has held that where an employee called his supervisor a liar:

> [t]he employer may effect such discipline [discharge] even though it knows the employee is a union advocate, for the right of an employer to maintain order and insist on a respectful attitude by his employees towards their superiors is an important one. Verbal abuse directed at an employee's supervisor, especially when, as here it is uttered in the presence of a department head, would, if left undisciplined, tend to diminish the respect of other employees for their employer and encourage insubordinate conduct by them. *Great Dane Trailers*, 204 NLRB 536, 537 (1973).

In making this finding that Machado's insubordination prompted her discharge, I am aware that the two contemporaneous documents authored by decision-makers Dr. Rico and Prado do not mention Machado's insubordination or challenge to Francisco. Thus, Dr. Rico's letter to his attorney on October 3 and Prado's letter to the DOL on October 5 state only that she was fired for not sitting at the customer window in violation of company policy.

I accordingly appreciate the General Counsel's argument that Machado's insubordination was an "afterthought" added to support the firing. However, I believe that although not articulated in the letters, Machado's admitted challenge and insubordination to Francisco were the essential reasons for her firing. I accordingly find and conclude that the Respondent has met its burden by proving that it would have fired Machado for insubordination even in the absence of her union activities. It cannot be said that there was disparate treatment in Machado's discharge. Granado did not engage in insubordinate behavior toward Francisco, and although she too was believed by the Respondent to be a union supporter, she received no discipline for sitting at the table. The fact that Granado was not disciplined supports the Respondent's argument that Machado was discharged for insubordination and not simply for sitting at the table or even doing her nails.

I have some question about the "rule" that employees must sit at the window counter. First, the rule is not in writing. Dr. Rico's warning to Machado on September 10 that she was not sitting at the counter stated that he gave written instructions to Machado and Granado about the policy. Nevertheless, no such written instructions were produced at hearing. His statement that he put a note in their files in front of them is questionable since both Machado and Granado denied being warned that day that they engaged in such transgression. Again, no such note was produced at hearing. It also appears that employees are permitted to sit at the table in the work area to eat lunch, do inventory and prepare a cash register reconciliation.

However, I find that the precipitating event which prompted the discharge was brothers Francisco and Carlos' observation that Machado was not sitting at her post at the customer window, but instead was polishing her nails. Her loud and immediate denunciation of Francisco as a liar when he challenged her conduct constituted insubordinate conduct. Accordingly, I conclude that the Respondent has met its burden of proving that it would have discharged Machado in the absence of her union activities.

B. Jose Vicente Londoño

It may be assumed that the Respondent believed that Londoño was a union supporter since all but one employee voted for the Union in the election. He did not, however, sign the grievance letter referred to above. Assuming that the General Counsel has made a prima facie case that Londoño was discharged because of his union activity, a finding I cannot conclusively make here, I also find that the Respondent has met its burden that it would have discharged him even in the absence of those activities.

The precipitating cause of the discharge was Londoño's conduct regarding the Guererro purchase. The customer paid with a debit card and then decided he wanted a different product. The new product had to be rung up and a refund made. Londoño claims that he had, for years, processed such transactions and knew exactly what to do, but nevertheless testified that he asked Francisco and Rico to "take over" the transaction and try to solve the problem. . . . " Londoño then stood back and observed how the brothers were handling the matter.

This corroborates the testimony of the brothers and Guerrero that Alba performed the initial transaction and, according to the brothers she asked for help and that, according to Carlos, the Londoños told him that they had not handled a refund from a debit card transaction. That might explain why Vicente asked them to resolve the "problem." The fact that he stood back and watched as they phoned Miami corroborates the brothers' testimony that he was not initially involved in the transaction, as Guerrero also testified, and that as he waited for what he believed was a long enough time, he just suddenly took over the transaction and completed it. This confirms the brothers' testimony that as Francisco was at the cash register speaking to Prado, Vicente approached the register and began punching in the transaction.

Vicente further stated that the brothers' phone call to Miami asking how to process the transaction took "a while" and he concluded that they did not know what they were doing. He thereupon told them that they were looking for a problem when none existed and proceeded to complete the transaction. If indeed, Londoño had processed such transactions in the past, why would he step aside and ask the brothers to take over and solve the "problem?" In fact, he concedes that the brothers called Miami for instructions while he was waiting. Accordingly, the Respondent's evidence that while the brothers were waiting for such advice Londoño took over the transaction and refused to stop is quite credible. Why did he not wait until the owners had received the instructions they were in the process of obtaining?

In this connection, Francisco's testimony that Prado asked him why he permitted Londoño to take over the transaction and Francisco's reply that he had no choice—he did not want to physically stop him is quite believable. Londoño himself really does not dispute this—he stated that Guerrero appeared anxious to leave, he had an "automatic reaction," and, determining that the brothers did not know what they were doing, he processed

the transaction as he saw fit.

Accordingly, the evidence is clear that Londoño refused to await instructions as to how to handle the transaction and decided to continue to process the transaction despite being told to stop. He gave Guerrero a refund from the cash register in violation of the instructions given to Francisco. Guerrero's testimony that he saw Francisco give an order to Londoño who then gave him cash from the register does not mean that Francisco told him to do so. Guerrero did not hear the order. It could have been an order to Londoño as testified by Francisco, to stop the transaction.

Moreover, the evidence is clear that during Lodoño's insubordinate refusal to stop performing the transaction and before his discharge, he was offensive to the brothers. Alba conceded that Londoño called them "money suckers" or "pocket suckers" who were unfair to the workers. I credit Francisco's and Carlos' testimony, supported by the DOL submission, that Londoño refused to stop processing the transaction and told them that the way that they sought to process the transaction was "illegal." Londoño's admission that the brothers did not know what they were doing supports a finding that he told them, as testified by the Respondent's witnesses, that what they were doing was illegal and that he knew the correct way to handle the matter. The fact that these offensive comments and insubordination took place in front of another worker and a customer provides further support for a finding, which I make, that the discharge was justified. *Great Dane Trailers*, above.

CONCLUSIONS OF LAW

1. By threatening employees with loss of jobs and store closures if they voted for the Union the Respondent violated Section 8(a)(1) of the Act.

2. By threatening employees with relocation of the business out of state and with store closure if the employees continued to support the Union, the Respondent violated Section 8(a)(1) of the Act.

3. By making statements indicating that support for the Union was futile, the Respondent violated Section 8(a)(1) of the Act.

4. By threatening employees with unspecified reprisals in retaliation for their support for and activities in behalf of the Union, the Respondent violated Section 8(a)(1) of the Act.

5. By accusing its employees of disloyalty because they supported the Union, the Respondent violated Section 8(a)(1) of the Act.

6. The Respondent has not violated the Act by discharging Yolaidys Machado and Jose Vicente Londoño.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because the primary language of the employees involved is Spanish, the notice shall be posted in English and Spanish at all of the Respondent's New York and New Jersey stores.

[Recommended Order omitted from publication.]